BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAURA L. GALVAN	)	
Claimant	)	
VS.	)	
	)	
UNIVERSITY OF KANSAS HOSPITAL AUTHORITY	)	
Respondent	)	Docket No. 1,065,010
AND	)	
	)	
SAFETY FIRST INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the March 19, 2014, Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. James E. Martin of Overland Park, Kansas, appeared for claimant. Matthew J. Stretz of Kansas City, Missouri, appeared for respondent. In her Application for Hearing, claimant asserted she sustained bilateral upper extremity injuries from repetitious activities commencing on or about February 7, 2013, and each and every day worked thereafter arising out of and in the course of her employment with respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 19, 2014, motion and preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant testified she became employed by Equity Staffing Group (Equity), a temporary employment agency, in June 2012.[1] She was assigned to work in housekeeping in respondent's hospital, where she worked until January 6, 2013. On January 7, 2013, claimant became an employee of respondent, but her job duties did not change. Those

[1] Respondent's Application for Review indicated claimant worked for Equity from July 12, 2012, to January 6, 2013.

job duties were cleaning patient rooms daily, including wiping and sanitizing counters, cleaning bathrooms, mopping, sweeping and making beds. As indicated above, claimant alleged an injury by repetitive trauma commencing on February 7, 2013.

On August 27, 2013, respondent filed a Motion to Implead Additional Employer seeking to implead Equity. The motion cited K.S.A. 44-503(b) and asserted that liability for claimant's alleged work-related medical condition rested with Equity, not respondent. On February 25, 2014, respondent filed a Notice of Motion Hearing and served a copy by mail and facsimile upon Equity and claimant. The notice indicated respondent's Motion to Implead Additional Employer was set for hearing on March 19, 2014. On February 26, 2014, claimant filed a Notice of Preliminary Hearing indicating a preliminary hearing was set for March 19, 2014. The Notice of Preliminary Hearing was served by email upon respondent, but not Equity.

At the March 19, 2014, motion and preliminary hearing, Rachel E. Nelson appeared for Equity and Technology Insurance Company. Respondent's Motion to Implead Additional Employer was addressed by the ALJ. Although he addressed the Motion to Implead Additional Employer, the ALJ did not rule on the motion. The ALJ indicated another issue before the court was the fact Equity was not named as a party on the Application for Preliminary Hearing filed by claimant and Equity had not received notice of the preliminary hearing. Equity indicated it did not receive notice of the preliminary hearing, did not have time to adequately prepare and was objecting to the preliminary hearing. The following discourse occurred:

> THE COURT: Section [K.S.A. 44-503](f) talks about impleading but, again, that's in the situation where the principal is liable.
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> In the end, here's what I'm going to say. If Equity is objecting to being subject to a preliminary order here, Equity can leave and I'll simply take up the case of whether or not KU is liable and decide that. However, do know there's going to be testimony here that could affect Equity. If you choose to stay for that reason, I'll let you stay but I'm not going to let you question the claimant and weigh in here unless you're willing to waive your objection on the prelim and allow me to actually call Equity an employer here and put an order against them. So that's the choice I'm leaving you with.
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> MS. NELSON: Okay. I'll keep my objection and stay but I won't question her, if that's okay. Is that what you're asking?
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> THE COURT: Okay. So you'll waive your right to cross-examination but we'll just note you're here?
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> MS. NELSON: Yeah. I guess what I'm asking is, we're not going to be named as a party to this hearing so if we would like to later go back and be able to depose the claimant or figure out kind of what's going on, we have the right to do

> that later when we become a named party? I'm trying to figure out procedurally how this will work.
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> THE COURT: Yes, that's correct.
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> MS. NELSON: Okay.
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> THE COURT: Basically, if I find the injury is from work prior to January 6th, it's not even going to be a case against KU, period. If I find it's after January 6th, then it's against KU. Equity's out of the picture.[2]

In its Application for Review, respondent raised the following issues: (1) was claimant's employment with respondent the prevailing factor causing claimant's repetitive trauma or resulting injury; (2) did claimant's injury arise out of and in the course of her employment with respondent; and (3) should respondent and its insurance carrier be liable for claimant's medical treatment? Respondent did not raise as an issue whether the ALJ erred by granting Equity's objection to participating in the preliminary hearing. Nor did respondent assert the ALJ should have granted its motion to implead Equity.

Claimant asserts respondent has no right to appeal the ALJ's preliminary hearing Order. Claimant argues there is no doubt she sustained an injury by repetitive trauma, that her injury arose out of and in the course of her employment and that she gave timely notice. Therefore, none of the circumstances in K.S.A. 2012 Supp. 44-534a(a)(2) granting the Board jurisdiction exists.

This case was considered submitted by the parties to the Board on May 2, 2014, as the appellee/claimant filed her brief on May 1, 2014. On May 15, 2014, appellant/respondent filed a reply brief with the Board. Under K.A.R. 51-18-4(a)(3), appellant/respondent may file a reply brief, but said reply brief is limited to any new issues raised in appellee/claimant's brief. No new issues were raised in appellee/claimant's brief. The undersigned Board Member will not consider appellant/respondent's reply brief.

Respondent's Application for Review was not served upon Equity or its insurance carrier. Counsel for Equity and its insurance carrier did not file a brief for this appeal.

The issues before the Board are:

1. Does the Board have jurisdiction to consider respondent's appeal?

2. Did claimant's injury arise out of and in the course of her employment with respondent? Specifically, were claimant's work activities with respondent the prevailing factor causing claimant's injury and need for medical treatment?

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[2] P.H. Trans. at 12-14.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On February 7, 2013, while working for respondent, claimant noticed pain in one of her thumbs[3] that would go away if she stopped working for a few minutes. Claimant continued to work, but the pain returned the next day. The pain worsened and on February 20, 2013, claimant notified her supervisor of the injury. Claimant went to see her own physician.

Respondent sent claimant to see Dr. Bono in Occupational Health. Claimant estimated she saw Dr. Bono one week after informing her supervisor of her injury. Claimant indicated she told the doctor of having no symptoms between June 12, 2012, and January 6, 2013. Occupational Health is part of respondent. Dr. Bono prescribed physical therapy, a brace and Naprosyn. Claimant continued to work for respondent and was placed on light duty. Despite her treatment and being placed on light duty, claimant's condition worsened. Neither Dr. Bono's nor claimant's personal physician's medical records were placed into evidence.

Claimant saw Dr. Eden Wheeler on April 17, 2013, at respondent's request. According to claimant, the doctor continued claimant's physical therapy and referred her to Dr. Joseph F. Galate, who conducted diagnostic tests. Dr. Wheeler returned claimant to her regular job duties, as there was no medical need for restrictions. The doctor's April 17, 2013, report indicated claimant gave a history of working at respondent for ten months, initially working through a temporary agency and then being hired by respondent on January 7, 2013. With regard to prevailing factor, the doctor stated:

> After today's history and examination and review of records, I do not identify a history of pre-existing complaints regarding her right upper extremity. Although certainly there is some concern as her symptoms began within one month of her actual full-time employment through KU, and without ability to relate a specific event or incident, I would identify her work activities of 02/07/13 as the prevailing factor for her current right subjective complaints with again noted minimal objective findings.[4]

On May 1, 2013, Dr. Galate conducted an EMG study on claimant's right upper extremity. The doctor indicated the EMG results revealed moderate right carpal tunnel

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[3] Claimant later testified that because her right hand was hurting, she would use her left hand. Also, the medical records indicated claimant first began having pain in her right hand.

[4] P.H. Trans., Resp. Ex. A.

syndrome and no electrophysiological evidence of radiculopathy, other neuropathy or myopathy. A copy of Dr. Galate's May 1, 2013, report was made part of the record.

Dr. Wheeler saw claimant again on May 2, 2013. The doctor had the May 1, 2013, EMG findings for review. Dr. Wheeler again was made aware of claimant's employment history at Equity and respondent. Dr. Wheeler reversed course on prevailing factor and opined:

> I am unable to identify Ms. Galvan's employment at KU Medical Center, with employment effective 01/07/13, as the prevailing factor for her carpal tunnel syndrome. Moderate carpal tunnel syndrome does not develop within a 30 day [time frame], but requires a much longer period of time. Further, electrodiagnostic testing typically requires at least 6-8 weeks for abnormalities to present after symptom onset.[5]

Dr. Wheeler also stated:

> Although I do recommend Ms. Galvan for additional treatment, this will need to be pursued by another provider as she is considered released from medical care with no correlation between her employment at KUMC and her carpal tunnel syndrome.[6]

In notes dated June 4, 2013, Dr. Wheeler indicated she had reviewed a May 22, 2013, report of Dr. Galate in which he noted claimant's complaints of neck and left arm pain. Dr. Wheeler indicated Dr. Galate's examination of the left upper extremity and cervical paraspinals, including both needle examination and conduction velocity assessment, was within normal limits. According to Dr. Wheeler, claimant was at maximum medical improvement for her left upper extremity symptoms.

Claimant testified she was terminated by respondent for missing too much work to attend doctor appointments and physical therapy sessions.

At the request of her counsel, claimant was evaluated by Dr. Lynn D. Ketchum on June 20, 2013. The doctor's diagnoses were stenosing tenosynovitis of the right first digit and right carpal tunnel syndrome of moderate severity. The history in Dr. Ketchum's report indicated that after reporting right upper extremity pain to her supervisor, claimant was told to take ibuprofen and to see her family physician, who put her on light duty, applied a splint and kept her off work for a week. The history went on to indicate that at that point, respondent sent claimant to Occupational Health, where she saw Dr. Bono, who put her on light duty and sent her to Dr. Wheeler. Dr. Ketchum opined:

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[5] *Id.*

[6] *Id.*

> It is my opinion, within a reasonable degree of medical certainty, that since she did not have this prior to beginning work at KU and since she did do repetitive work at KU and does not have any hobbies or sports of a repetitive nature, that the prevailing factor in causing the stenosing tenosynovitis of her right first digit and her right carpal tunnel syndrome is the repetitive work that she did in the housekeeping department at the KU Medical Center.[7]

However, Dr. Ketchum's report also states, "She has worked for KU Medical Center in housekeeping for one year and denies any problems with the right upper extremity prior to beginning work at KU."[8]

The ALJ found claimant's right upper extremity injury by repetitive trauma arose out of and in the course of her employment with respondent, stating:

> The second question is difficult. The repetitive trauma arose from increased risk the claimant experienced in both KU and Equity employment, and she experienced a longer period of increased risk with Equity. On the other hand, the claimant's injury didn't exist until after she was exposed to the KU increased risk for four to five weeks. The injury required both six months of Equity work and a final approximate month of KU work in order to develop.
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> In these particular facts, and in spite of Dr. Wheeler's opinion, it is held the increased risk of the KU work was the prevailing factor in causing the repetitive trauma and the injury. KU knew firsthand the claimant had been subject to the types of repetitive trauma in KU housekeeping duties for six months. KU then hired the claimant for additional housekeeping and additional repetitive trauma. This additional month of work on top of what KU already knew firsthand the claimant had performed, caused the right carpal tunnel syndrome to emerge.
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> The respondent, University of Kansas Hospital, and insurance carrier, Safety First Insurance Company, shall be liable for the claimant's treatment to date through their authorized medical providers and shall provide the claimant additional treatment for the right upper extremity injury as directed by Dr. Wheeler.
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> The record at this point failed to prove a compensable left upper extremity injury.[9]

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues respondent has no right to appeal because the Board lacks jurisdiction. K.S.A. 2012 Supp. 44-534a(a)(2) limits the jurisdiction of the Board to the

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[7] *Id.,* Cl. Ex. 1 at 2.

[8] *Id.*, Cl. Ex. 1 at 1.

[9] ALJ Order at 2.

specific jurisdictional issues identified. Under K.S.A. 2012 Supp. 44-534a(a)(2), a contention that the ALJ has erred in finding claimant sustained a personal injury arising out of and in the course of his or her employment is an argument the Board has jurisdiction to consider. Respondent asserts claimant's bilateral upper extremity injuries by repetitive trauma did not arise out of and in the course of her employment with respondent. Respondent asserts that if claimant sustained bilateral upper extremity injuries, they arose out of and in the course of claimant's employment with Equity. That is an issue over which the Board has jurisdiction on an appeal from a preliminary hearing Order.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[10] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[11]

Respondent asserted this case is similar to *Navinskey*.[12] In *Navinskey*, claimant worked for Advanced from 2007 through June 3, 2012. Advanced was purchased by Performance on June 4, 2012. That same day, Navinskey began working for Performance, performing the same job duties he performed at Advanced. In his original application for hearing, Navinskey asserted that during the period of July 1, 2007, through June 11, 2012, he sustained bilateral upper extremity and whole body injuries by repetitive trauma. Navinskey filed an amended application for hearing alleging the date of injury as March 1, 2012, through June 11, 2012. In both the application and amended application for hearing, Navinskey listed Advanced and Performance as employers.

The undersigned Board Member found Navinskey's repetitive work activities at Advanced were the prevailing factor causing his injuries and current need for medical treatment. This Board Member also determined there was insufficient evidence to show claimant's work activities at Performance were the prevailing factor causing his injuries and current need for medical treatment.

Navinskey is distinguishable from the current claim in two ways. First, while working for Advanced, Navinskey experienced symptoms in April 2012, or two months before going to work for Performance. In the present case, claimant experienced no pain symptoms while working for Equity. Second, in *Navinskey*, the application and amended application

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[10] K.S.A. 2012 Supp. 44-501b(c).

[11] K.S.A. 2012 Supp. 44-508(h).

[12] *Navinskey v. Advanced Protective Coating and Performance Contracting Group,* No. 1,061,603, 2013 WL 485715 (Kan. WCAB Jan. 11, 2013).

for hearing listed Advanced and Performance as Navinskey's employers. In the present claim, the application for hearing listed only respondent as claimant's employer.

Claimant's testimony that she did not experience pain symptoms in her right upper extremity until February 7, 2013, when she was employed by respondent, is uncontroverted. This Board Member does not find Dr. Wheeler's opinion on prevailing factor particularly persuasive. The doctor initially found claimant's work activities at respondent were the prevailing factor causing her injury. The doctor later changed that opinion after being reminded claimant began working for respondent on January 7, 2013. Dr. Wheeler's rationale in changing her opinion was that it takes much longer than 30 days for a person to develop moderate carpal tunnel syndrome. However, Dr. Wheeler appeared to have taken that fact into consideration when she rendered her first opinion that claimant's work activities with respondent were the prevailing factor causing her injuries. As noted above, Dr. Wheeler stated on April 17, 2013, that while there was concern claimant's symptoms began within one month of her actual full-time employment through respondent, and without the ability to relate a specific event or incident, her work activities of February 7, 2013, were the prevailing factor for her right subjective complaints.

In support of her second prevailing factor opinion, Dr. Wheeler indicated electrodiagnostic testing requires at least six to eight weeks for abnormalities to present after onset. Claimant's symptoms began on February 7, 2013. Dr. Galate's EMG of claimant's right upper extremity was conducted on May 1, 2013, or 12 weeks after claimant's onset of symptoms. That fact lends further credence to claimant's argument her injury by repetitive trauma arose out of and in the course of her employment with respondent.

Dr. Wheeler first saw claimant on April 17, 2013, or more than 90 days after she began working for respondent. Claimant's continued work activities from February 7, 2013, through the time she first saw Dr. Wheeler likely caused claimant's condition to worsen. That is supported by claimant's testimony that her condition worsened, even after she was placed on light duty.

Admittedly, Dr. Ketchum was under the impression claimant always worked for respondent. However, the doctor was aware claimant's symptoms did not begin until February 2013. Dr. Ketchum knew the EMG tests conducted by Dr. Galate revealed moderate right carpal tunnel syndrome, but no indication of left carpal tunnel syndrome.

Simply put, claimant proved by a preponderance of the evidence that her work activities while working for respondent were the prevailing factor causing her right upper extremity injuries and need for medical treatment and that she sustained personal injury by repetitive trauma arising out of and in the course of her employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

WHEREFORE, the undersigned Board Member affirms the March 19, 2014, Order entered by ALJ Hursh.

IT IS SO ORDERED.

Dated this ____ day of June, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge

[13] K.S.A. 2013 Supp. 44-534a.

[14] K.S.A. 2013 Supp. 44-555c(j).